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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT L. HERNANDEZ, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

KATHERINE JEAN GRAHAM, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS
FOR THE FIRST AND NINTH CIRCUITS

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a payment to the Church of Scientology for auditing or training sessions is deductible from gross income as a "contribution or gift" under Section 170 of the Internal Revenue Code.

2. Whether the First Amendment requires that such a payment be deductible from gross income.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-963

ROBERT L. HERNANDEZ, PETITIONER

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COMMISSIONER OF INTERNAL REVENUE

No. 87-1616

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v.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND NINTH CIRCUITS

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

In No. 87-963, the opinion of the court of appeals (87-963 Pet. App. 1a-28a) is reported at 819 F.2d 1212. The decision and order of the Tax Court (87-963 Pet. App. 43a) is unreported. In No. 87-1616, the opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 822 F.2d 844. The opinion of the Tax Court (Pet. App. 36a-46a) is reported at 83 T.C. 575.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 87-1616.

JURISDICTION

In No. 87-963, the judgment of the court of appeals (87-963 Pet. App. 29a) was entered on June 1, 1987. A petition for rehearing was denied on July 15, 1987 (87-963 Pet. App. 30a). On October 6, 1987, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including December 12, 1987. The petition was filed on December 11, 1987, and was granted on April 18, 1988. In No. 87-1616, the judgment of the court of appeals (Pet. App. 19a) was entered on July 17, 1987. A petition for rehearing was denied on December 1, 1987 (Pet. App. 20a-21a). On February 19, 1988, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 30, 1988. The petition was filed on that date and was granted on May 23, 1988, at which time it was ordered consolidated with No. 87-963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution and Section 170 of the Internal Revenue Code (26 U.S.C.) are set forth in an appendix (App., *infra,* 1a-2a).

STATEMENT

1. The issue in this case concerns the deductibility from gross income of payments made by petitioners to the Church of Scientology. The Church is an international network of organizations that consists both of a central organization, the "mother" Church of Scientology of California, and of numerous branches and divisions that are separate entities for tax purposes. The Church is organized in a hierarchical fashion with the spiritual leadership pro-

vided by the highest division, which issues policy letters and directives to the lower-ranking divisions. Scientology teaches that an individual is a spiritual being having a mind and a body. A process called "auditing" is believed to help an individual to gain spiritual competence. Auditing is administered in a one-to-one session by a trained Scientologist who asks questions of the auditee and identifies areas of spiritual difficulty by using an electronic device to measure skin responses during the session. Scientologists believe that the highest level of spiritual ability and awareness can be attained only by progressing on a step-by-step basis through ascending levels of auditing, which is provided in short blocks of time known as "intensives." The Church also provides "training" courses, in which individuals study the doctrines and tenets of Scientology; Scientologists are taught that spiritual gains also result from participation in these courses, and training courses, like auditing, are provided in ascending levels. Pet. App. 24a-26a, 38a; *Church of Scientology* v. *Commissioner,* 83 T.C. 381, 385-388 (1984), aff'd, 823 F.2d 1310 (9th Cir. 1987), cert. denied, No. 87-1377 (May 16, 1988).

The Church charges a "fixed donation" for training courses and auditing intensives. These charges are set forth in schedules, and they vary depending upon the length and content of the programs (with the price per hour generally declining for longer programs) (see J.A. 97, 99, 115, 121-125). The charges for each particular program, however, do not vary; they are quite substantial,[2] and they are almost never waived. Indeed, an official policy letter issued by the Church states that "[p]rice cuts are forbidden under any guise" and that "PROCESSING

[2] For example, in 1972 the charge for the shortest available auditing intensive was $625 for 12½ hours. The charge for a 100-hour intensive was $4,250. See Pet. App. 39a; J.A. 97.

MAY NEVER BE GIVEN AWAY BY AN ORG." (Pet. App. 39a n.6).[3] The Church does offer a standard 5% discount on its programs, however, if full payment is made in advance of the services to be rendered (*id.* at 40a; J.A. 121). Under certain conditions, refunds are available for "undelivered" services if an individual does not complete a particular program. The refund must be sought in writing within 90 days, and the individual must undertake to release the Church from further obligation. A 12% administrative charge is deducted from the refund, and the Church will not again audit or train an individual who obtains a refund. J.A. 104-105. Applicants for auditing and training are expected to sign enrollment forms accepting the conditions under which these services are rendered (see J.A. 131-133). This system of mandatory, fixed charges for its programs is an application of a tenet of the Church, the "doctrine of exchange," which provides that "anytime a person receives something, he must pay something back" (Pet. App. 38a-39a).

The Church aggressively promotes its auditing and training programs by means of free lectures, handouts, magazines published by the Church, and newspaper, magazine, and radio advertising. These promotional activities are geared to be responsive to community concerns that are determined from surveys. Pet. App. 29a-31a, 40a. The promotional literature emphasizes the benefits—"gains beyond measure" (J.A. 111)—that an individual will achieve from enrolling in the particular Scientology program. These advertised benefits generally pertain to

[3] The policy letter further states that free services can be awarded only to fully contracted staff, and then only by means of a legal note that makes the staff member liable to the Church for at least $5,000 if the contract is broken (Pet. App. 39a n.6; *Church of Scientology* v. *Commissioner*, 83 T.C. at 416).

increasing one's happiness, control over one's life, and ability to handle other people (see J.A. 107, 109-111). Specifically, the Church's literature claims that its courses teach one "how to correctly study," how to "control anything in life," "how to become more efficient," "how to handle exhaustion," and "an improved memory," and that they "reliev[e] a person of the need for drugs or alcohol" (J.A. 110). The advertisements also promise "friendly, personal service" (J.A. 111) and encourage individuals to take advantage of the advance payment discount and other "savings" on "economical" package arrangements (J.A. 106-107, 120, 127; C.A. App. 101).[4]

2. Each of the petitioners made payments to a branch of the Church of Scientology for auditing or training, or both, and sought to deduct those payments on his or her income tax return as charitable contributions under Section 170 of the Internal Revenue Code.[5] Petitioner Hernandez paid $7,338 to the Church in 1981 and took a deduction in that amount on his 1981 tax return (87-963 Pet. App. 1a-2a). Petitioner Graham paid a total of $1,682 to the Church of Scientology, Hawaii, and to the Scientology and Dianetic Center of Hawaii in 1972 and took a deduction in that amount on her 1972 income tax return. Of that amount, approximately $400 was for a training course and the balance was for auditing; some of the payments towards courses were for Graham's daughters. Pet. App. 40a-41a. Petitioner Hermann made payments of $4,875 to the Church of Scientology, American Saint Hill Organization, in 1975 in order to take the Class 0-9 package of training courses, though he ultimately applied

[4] "C.A. App." refers to the court of appeals appendix filed in the *Hernandez* case.

[5] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

the payments to other Scientology courses and auditing. On his income tax return for that year, he took a $3,922 deduction for payments to the Church. *Id.* at 41a. Petitioners Graham and Hermann each testified that they understood that these payments were a prerequisite to receiving the auditing and training that they sought (C.A. App. 283, 288, 321). Petitioner Maynard paid $4,699 to the Church of Scientology, Mission of Riverside, in 1977 as advance payments for auditing and training courses. He took a $5,000 deduction on his income tax return for that year, reflecting a carryover from payments that he had made to the Church in 1976 but had not deducted on his return for that year. Pet. App. 41a.

The Commissioner disallowed these deductions, concluding that the payments to the Church were not "charitable contribution[s]" within the meaning of Section 170 of the Code.[6] Petitioners sought redetermination of the resulting deficiencies in the Tax Court. Petitioner Hernandez's case was not tried, nor was there any evidentiary submission. Instead, petitioner Hernandez entered into a stipulation with the Commissioner (87-963 Pet. App. 44a-45a) to be bound, subject to the right of appeal, by "any relevant findings of fact and conclusions of law" (excluding those relating to "subjective intent") to be made by the Tax Court in the cases of petitioners Graham, Hermann, and Maynard, which were consolidated for trial.[7]

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[6] A "charitable contribution" that may be deducted on one's income tax return is defined in the statute as "a contribution or gift" to or for the use of certain eligible donees, which include qualifying entities "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * * " (§ 170(c)(2)(B)).

[7] The government entered into similar stipulations with numerous other taxpayers who had filed petitions in the Tax Court challenging the denial of charitable deductions for payments to the Church of Scientology.

The stipulation further provided that the record in *Graham* would be deemed part of the record in *Hernandez* for purposes of appeal. Accordingly, no facts were developed pertaining to petitioner Hernandez, apart from the information contained on his return that he had made $7,338 in payments to the Church of Scientology in 1981, a fact that the Commissioner had not questioned in his notice of deficiency.

3. A trial was held in the *Graham* case, and the Tax Court upheld the Commissioner's determination with respect to petitioners Graham, Hermann, and Maynard (Pet. App. 36a-46a). The decision was based in part on certain stipulations concerning the Church (see *id.* at 22a-32a). For purposes of this litigation only, the government did not contest that Scientology was a religion and that each Scientology organization to which the *Graham* petitioners paid money was a church within the meaning of Section 170(b)(1)(A)(i) of the Code, a tax-exempt organization under Section 501(c)(3), and an eligible recipient of deductible charitable contributions under Section 170(c)(2) (Pet. App. 31a-32a, 37a). The parties also stipulated to the record in another case that was pending at the time, *Church of Scientology* v. *Commissioner, supra,* which concerned the validity of the "mother" church's tax exemption, and the Tax Court here incorporated all relevant findings of fact from the tax exemption litigation into the opinion in the *Graham* case. Petitioners did not argue that the Scientology entities that received their payments operated differently from the "mother" Church, and accordingly the Tax Court assumed that in these cases the Church operated in the same manner as that reflected in the record in the tax-exemption litigation. Pet. App. 37a.[8]

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[8] These stipulations allowed the charitable deduction cases to go forward without awaiting the final outcome of the litigation over the

In addition to the stipulated facts, the Tax Court made findings of fact pertaining to the operation of the Church based on the record developed at trial (see Pet. App. 37a-41a). The court found that the Church "charge[s] a 'fixed donation' for training and auditing" and that "[w]ith few exceptions, these services are never given for free" (*id.* at 39a (footnote omitted)). The court also stated as a finding of fact that the Church "operates in a commercial manner" in providing its auditing and training services and that its stated "goal of making money permeates virtually all of the Church of Scientology's activities" (*id.* at 40a).

Based on the stipulations and the facts found on the record before it, the Tax Court concluded that the payments in question were not deductible "contributions," but rather were nondeductible payments made to purchase services (Pet. App. 41a-43a). The court explained that "[p]etitioners wanted to receive the benefit of various religious services provided by the Church," but the Church "generally provided those services only if they were purchased" (*id.* at 42a). Noting that advance payment discounts and refunds were available, the court stated that "[p]etitioners thus made payments to the Church in exchange for those services" (*id.* at 43a). The court concluded (*ibid.*): "The record demonstrates clearly that these payments were not voluntary transfers without consideration, but were made with the expectation of receiving a commensurate benefit in return. In addition, where contributions are made with the expectation of receiving a benefit, and such benefit is received, the transfer is not a charitable contribution, but rather a quid pro quo."

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validity of the "mother" Church's tax exemption. After a lengthy trial, the Tax Court held in that case that the Church failed to qualify as a tax-exempt organization for the years 1970-1972 because it diverted its profits to its founder and other persons, violated public policy by conspiring to impede the collection of its taxes, and conducted virtually all of its activities for a commercial purpose. See *Church of Scientology* v. *Commissioner*, 83 T.C. at 415-423, 473-480. The Ninth Circuit affirmed on the ground that the Church had diverted its profits for the inurement of private persons. It did not address the other grounds relied upon by the Tax Court, and it did not disturb any of the Tax Court's findings of fact. 823 F.2d 1310 (1987).

The court also rejected the contention that the denial of the deductions violated the First Amendment (Pet. App. 43a-46a). The court explained that the denial of a deduction for the payments made for auditing and training services does not "preclud[e] petitioners from engaging in constitutionally protected activities" (*id.* at 44a). The court also found that Section 170 establishes neutral "secular criteria" for determining the deductibility of payments to charitable organizations and hence does not unconstitutionally discriminate among religions (*id.* at 45a-46a). Finally, the court rejected petitioners' contention that the denial of the deductions resulted from "selective discriminatory action," finding no evidence that any discriminatory action was taken against petitioners (*id.* at 46a).

Following the entry of decisions sustaining the deficiencies in *Graham* (Pet. App. 33a-35a), the Tax Court entered a decision sustaining the deficiency in *Hernandez* "on the authority of *Graham*" (87-963 Pet. App. 43a).

4. a. The First Circuit affirmed the Tax Court's decision in *Hernandez* (87-963 Pet. App. 1a-28a). The court stated (*id.* at 5a) that its inquiry into whether the payments were "contribution[s] or gift[s]" within the meaning of Section 170 of the Code was framed by this Court's recent analysis of that question in *United States* v. *American Bar Endowment*, 477 U.S. 105, 118 (1986): "The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he pur-

posely contributed money or property in excess of the value of any benefit he received in return." The court rejected petitioner's contention that this inquiry into whether a particular payment was a contribution or, instead, part of a quid pro quo arrangement did not apply to payments for religious services. The court stated (87-963 Pet. App. 6a): "We find no indication that Congress intended to distinguish the religious benefits sought by [petitioner] from the medical, educational, scientific, literary, or other benefits that could likewise provide the *quid* for the *quo* of a nondeductible payment to a charitable organization." The court noted that petitioner Hernandez had not argued that he paid any part of the price for the services with the intention of making a gift to the Church or that his intentions were any different from those of the *Graham* petitioners, who the Tax Court found had made the payments with the expectation of receiving a commensurate return benefit (*id.* at 5a, 8a). The court also noted that the Church itself had established the prices for the services and that petitioner Hernandez had not argued that those prices were excessive (*id.* at 8a). Accordingly, the court concluded that, on the record before it, including the factual findings in *Graham,* petitioner Hernandez had "failed to shoulder [his] burden" of demonstrating that the payments in question were in fact charitable contributions (*id.* at 9a).

The court also rejected petitioner Hernandez's constitutional claims (87-963 Pet. App. 9a-28a). The court held that Section 170 does not create any denominational preferences on its face (87-963 Pet. App. 9a-10a) or as applied in this case (*id.* at 10a-15a). The court explained that the statute is neutral (*id.* at 14a): "gifts to all charitable organizations are tax deductible; *quid pro quo* payments are not." The court also held that the denial of a deduction did not violate petitioner's rights under the Free Exercise

Clause to make "fixed donations" in exchange for auditing and training classes (*id.* at 15a-24a). The court questioned whether the practice of making payments in exchange for auditing and training services was required by religious doctrine (*id.* at 17a-19a), but held that, in any event, the denial of a tax deduction for the payments did not require petitioner Hernandez to abandon that practice (*id.* at 19a-21a). The Court further stated that recognition of a First Amendment right to make tax-deductible payments in exchange for religious services would compromise the effectiveness and fairness of the tax system (*id.* at 23a-24a). The court also held that petitioner had not shown that he was the victim of selective prosecution in connection with the denial of the claimed deduction (*id.* at 24a-28a).

b. The Ninth Circuit affirmed the Tax Court's decision in *Graham* (Pet. App. 1a-18a). The court upheld the Tax Court's holding that the payments to the Church were not deductible contributions under Section 170, holding that the Tax Court applied the correct legal standards and that its factual findings were not clearly erroneous (*id.* at 7a-11a). The court of appeals explained that there is no contribution if a "measurable, specific return comes to the payor as a quid pro quo for the donation," finding that this formulation accords with that set forth in this Court's decision in *United States* v. *American Bar Endowment, supra,* (Pet. App. 8a). Thus, the court stated that "[i]t is the structure of the transaction, and not the type of benefit received, that controls"; "[i]f a transaction is structured in the form of a quid pro quo, where it is understood that the taxpayer's money will not pass to the charitable organization unless the taxpayer receives a specific benefit in return, and where the taxpayer cannot receive the benefit unless he pays the required price, then the transaction does not qualify for the deduction under section 170" (*ibid.*). The court rejected petitioner's contention that this approach does not apply to payments for religious benefits

or services, stating that "[t]he inquiry remains whether the donation is intended to benefit the charity without reference to a reciprocal and specific benefit to the donor, whether or not the benefit is religious" (*id.* at 9a).

The Ninth Circuit found that the evidence in the record was "fully sufficient" to justify the Tax Court's "determination of fact" that the payments to the Church were not contributions. Specifically, the court pointed to the following factors: "[s]olicitation for the services and agreements to render them based on price; conformity in price lists, and graduated prices based on the level of instruction; the contractual right to receive the service, and the right of refund if the service was not performed; account cards; and discounts for advance payments." These facts "all underscore that the payment matched, with some precision, the benefits to be received." Examining the testimony of the *Graham* petitioners, the court also found that petitioners "looked upon their donations as payments made for the quid pro quo receipt of a definite number of hours of auditing or training." Pet. App. 10a.

The court of appeals also rejected petitioners' constitutional claims (Pet. App. 11a-18a). The court held that, even if it assumed that payment for auditing and training was compelled by religious practice (which the court believed was not established by the record (*id.* at 13a-15a)), the denial of a tax deduction for such payments did not burden the exercise of petitioners' religious beliefs in violation of the Free Exercise Clause (*id.* at 15a-17a). The court also found no Establishment Clause violation, reasoning that Section 170 is "neutral in design and purpose" and reflects no intent "to visit a disability on a particular religion" (*id.* at 18a). And the court rejected the contention that the denial of the deductions was a result of discriminatory enforcement of the tax laws (*ibid.*).[9]

[9] In addition to the courts of appeals below, five other courts of appeals have ruled to date on the deductibility of payments made to the Church of Scientology akin to those made by petitioners. Each of these cases was decided on the basis of the same stipulation entered into by petitioner Hernandez to adopt the record and findings in the *Graham* case. Three courts of appeals reversed the Tax Court and held that the payments are deductible under Section 170. *Neher* v. *Commissioner*, No. 86-1275 (6th Cir. July 19, 1988); *Foley* v. *Commissioner*, 844 F.2d 94 (2d Cir. 1988), petition for cert. pending, No. 88-102; *Staples* v. *Commissioner*, 821 F.2d 1324 (8th Cir. 1987), petition for cert. pending, No. 87-1382. Two courts of appeals have joined the courts below in affirming the Tax Court and holding that the payments are not deductible. *Christiansen* v. *Commissioner*, 843 F.2d 418 (10th Cir. 1988), petition for cert. pending, No. 87-2023; *Miller* v. *Commissioner*, 829 F.2d 500 (4th Cir. 1987), petition for cert. pending, No. 87-1449. No court has found any constitutional infirmity in the Commissioner's determination to disallow the deduction.

SUMMARY OF ARGUMENT

I.

A. Section 170 of the Code permits a taxpayer to deduct from his gross income the amount of a "contribution or gift" made to certain eligible donees. It is well settled that that phrase encompasses only genuine contributions, not payments made for the purpose of receiving a commensurate benefit in return. Whether a particular payment is a contribution or part of a quid pro quo arrangement is a case-specific issue that turns on an assessment of all the facts and circumstances surrounding the particular payment.

B. The record in this case clearly demonstrates that, as the Tax Court and both courts of appeals below found, petitioners' payments to the Church were part of a quid pro quo arrangement to receive auditing and training services in exchange. The Church marketed and provided these services in a manner indistinguishable from the way any

other commodity is offered for sale in the marketplace—to advance its major policy goal of "mak[ing] money" (see Pet. App. 40a). The services were heavily promoted to the general public, emphasizing the personal benefits that would accrue to an individual in his daily life if he enrolled. The Church sought to attract purchasers by advertising the savings available on "package deals" and other discounts, and by emphasizing the personal benefits of large quantities of auditing. And the promotional literature promised refunds to dissatisfied customers.

Moreover, auditing and training courses were provided "only if they were purchased" (Pet. App. 42a). The Church maintained a strict policy against price cuts or the provision of free services, though it did allow refunds for unused services under certain conditions. The result was a textbook quid pro quo arrangement—a structure in which it was understood that petitioners' money would "not pass to [the Church] unless [they] receive[d] a specific benefit in return" and where petitioners could not "receive the benefit unless [they paid] the required price" (see Pet. App. 8a). Petitioners' testimony at trial confirmed their understanding that they could receive auditing and training only by purchasing the services at the price fixed by the Church. Because the payments in question were made by petitioners not as contributions but in order to secure the benefits of auditing and training, the payments are not deductible under Section 170.

C. Section 170 does not contain an exception for payments made in exchange for religious benefits. The requirement that a payment qualify as a "contribution or gift" in order to be deductible is a threshold one that applies to payments made to any eligible donee, and there is no basis for treating religious organizations differently for this purpose from the other types of charitable organizations listed in Section 170(c)(2). The fact that the payments

for auditing and training here may have furthered the purposes of the Church provides no basis for distinguishing them from payments made to other tax-exempt organizations in exchange for specific benefits. Whether the exempt organization is religious or secular, such payments may serve to further "charitable" purposes under Section 170, but the payments are not deductible contributions under Section 170.

The IRS has recognized that there may be "incidental" benefits received by an individual as a result of a charitable contribution that do not render that payment nondeductible, but the services received by petitioners as a quid pro quo in this case are not "incidental" in that sense. In the secular context, the IRS has found that recognition of a donation and certain attributes of membership are incidental benefits; in the religious context, the IRS has stated in a ruling that the saying of mass or the conduct of similar religious observances is a benefit to all members of the faith and any benefit to a given family is incidental. The latter conclusion is an application of general principles to a particular fact situation; contrary to petitioners, it does not stand for the proposition that all religious benefits must be treated as "incidental." The facts of this case show that the benefits paid for by petitioners were more than "incidental." The Church's promotional literature and enrollment form promised personal, individual benefits; there is no basis for concluding that petitioners' payments for these courses were intended to, or did, provide any significant broader-based benefits than those advertised by the Church.

The determination whether a religious benefit has been received as a quid pro quo for a payment depends on the circumstances surrounding the payment and the provision of the benefit. The fact that a religious benefit may have no value to one who is not an adherent of the religion does

not mean that the benefit must be ignored under Section 170 when it is structured as part of an inflexible quid pro quo arrangement. In this case, the rigid connection between the provision of auditing and training services and payment of the fixed price demonstrated a quid pro quo relationship and reflected the value that petitioners expected to receive for their money.

There is no administrative practice recognizing that payments made in exchange for religious benefits are tax-deductible. For example, the IRS has consistently challenged the deductibility of payments made to obtain religious schooling. The rulings cited by petitioners, relating to church dues and pew rents, reflect an effort by the IRS to apply to particular fact situations the same principles that are applied to payments to other tax-exempt organizations. Those principles point to the opposite result on the record in this case. While the IRS has reasonably concluded that church dues and pew rents ordinarily are intended as contributions, not for "personal accommodation," the record here clearly shows that the petitioners' payments were made for personal accommodation, "with the expectation of receiving a commensurate benefit in return" in the form of personal, individual services (Pet. App. 43a).

Petitioners' citation (Pet. Br. 18-25) to diverse fund-raising practices of other religions provides no basis for doubting the correctness of this conclusion. The practices described by petitioners, most of which have not been passed upon by the IRS, cover a spectrum—some are deductible, some may not give rise to a deduction, others may be "close to the line" (*Foley* v. *Commissioner*, 844 F.2d 94, 99 (2d Cir. 1988), petition for cert. pending, No. 88-102 (Newman, J., dissenting)). What they have in common is that they are all significantly different from the commercial, inflexible quid pro quo arrangement at issue here. Neither the IRS nor the courts have allowed a deduction for quid pro quo payments that can reasonably be analogized to the ones at issue here, and petitioners' attempt to bring the facts here under the umbrella of an established administrative practice is misconceived.

II.

The denial of petitioners' claimed deductions does not violate the First Amendment. Section 170 sets forth a neutral, secular standard in limiting deductions to genuine contributions; application of that standard involves no impermissible denominational preference. The failure to create a special statutory exception that would permit deduction of payments for auditing and training does not impermissibly burden the exercise of petitioners' faith; the relatively light burden of denial of a tax advantage is clearly outweighed by the importance of maintaining even-handed administration of the tax laws. The quid pro quo inquiry into the circumstances surrounding the payment and the provision of the benefit does not necessitate an unconstitutional entanglement between church and state.

ARGUMENT

THE COURTS BELOW CORRECTLY HELD THAT THE COMMISSIONER ACTED CONSTITUTIONALLY AND IN ACCORDANCE WITH THE STATUTE IN DETERMINING THAT PETITIONERS COULD NOT DEDUCT FROM GROSS INCOME PAYMENTS THEY MADE TO THE CHURCH OF SCIENTOLOGY

I. Petitioners' Payments To The Church Of Scientology For Auditing And Training Are Not Deductible From Gross Income As "Contribution[s] Or Gift[s]" Under Section 170 Of The Internal Revenue Code

The Internal Revenue Code generally makes an individual's income subject to taxation, but it also affords income tax deductions for certain types of expenditures.

Those deductions are purely a creation of statute and their availability is subject to the limitations established by Congress in the Code. Section 170 allows an individual to deduct "contribution[s]" to certain eligible donees, including certain religious, educational, and scientific organizations. It is well established that a payment to an eligible donee is not a deductible contribution if it is made with the expectation of receiving a commensurate benefit in return, *i.e.*, if the payment is made as part of a quid pro quo arrangement for the receipt of particular goods or services. The Tax Court and both courts of appeals below found that the record in this case establishes that petitioners' payments to the Church of Scientology were part of precisely such a quid pro quo arrangement; the payments—in the amounts fixed by the Church—were an absolute prerequisite to receipt of the auditing and training services that petitioners desired and the payments were made with the expectation of receiving those services in exchange.

Petitioners do not seriously dispute the factual conclusion that the payments were made as part of a quid pro quo arrangement for the receipt of services. Petitioners maintain, however, that this fact is irrelevant because the benefits they received were religious services for which payments must be deductible even if they are made as part of a quid pro quo. Section 170, however, which governs the scope of the charitable contribution deduction, provides no basis for excepting payments for religious services from the requirements applicable to payments for other services provided by tax-exempt organizations. Nor do constitutional considerations or any established administrative construction of the statute justify such an exception. Accordingly, the courts below correctly rejected petitioners' claimed deductions for their payments to the Church.

A. The Deductibility Of A Payment To A Charitable Organization Turns Upon The Factual Question Whether The Payment Is Part Of A Quid Pro Quo Arrangement For The Purchase Of Benefits Or Is Instead A Genuine Contribution

Section 170(a) allows a taxpayer to deduct a "charitable contribution" from his gross income. Section 170(c) defines that term as a "contribution or gift" to certain eligible donees, including organizations "operated exclusively for religious, charitable, scientific, literary, or educational purposes" that otherwise meet the statutory qualifications (I.R.C. § 170(c)(2)). The key phrase "contribution or gift" is not further defined in the Code. The legislative history of the 1954 Code, however, clearly indicates Congress's understanding that the term encompasses only payments that are "made with no expectation of a financial return commensurate with the amount of the gift" or of any "quid pro quo." S. Rep. 1622, 83d Cong., 2d Sess. 196 (1954); H.R. Rep. 1337, 83d Cong., 2d Sess. A44 (1954). It is thus well settled that determining the deductibility of a payment under Section 170 involves a factual inquiry into whether the payment is a contribution or instead a purchase of goods or services; and it is recognized that drawing the line between these two categories of payments can be a difficult task that "requir[es] an assessment of all the facts and circumstances." See generally 2 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 35.1.3 (1981); *id.* at 35-9.

The case law developed under Section 170 illustrates the dichotomy between payments to a charity in exchange for services and a true contribution. For example, in *Sedam* v. *United States,* 518 F.2d 242 (7th Cir. 1975), the court disallowed a charitable contribution deduction claimed for a payment made to a retirement home. The payment was required as a condition of admitting the taxpayer's mother to the home, and the court reasoned that "a payment is not

a contribution or gift under section 170 if it is made with the expectation of receiving a commensurate benefit in return" (*id.* at 245). By contrast, in *Dowell* v. *United States,* 553 F.2d 1233 (10th Cir. 1977), the court allowed a deduction for a payment to a retirement home where there was not the same nexus between the payment and receiving admission to the home. The court explained that there was lacking a "direct gain or benefit to the donor such as that found in *Sedam*" (*id.* at 1239), and it emphasized that the outcome must be "predicated entirely on the facts in evidence and the circumstances reflected in the record of *this* case" (*id.* at 1237-1238 (emphasis in original)).

The fundamental distinction between a contribution and a quid pro quo arrangement—and the degree to which deductibility turns on the particular facts—is similarly illustrated by *Singer Co.* v. *United States,* 449 F.2d 413 (Ct. Cl. 1971). In that case, the taxpayer sold its sewing machines at a discount to churches, hospitals, and schools, and sought to deduct the amount of the discount as a charitable contribution. The court of appeals allowed the deduction for the machines that went to the churches and hospitals, reasoning that the taxpayer's primary purpose was to foster the charitable activities of the recipients; the "favorable public image" that resulted from these discount sales was viewed as only an "incidental" benefit, not a quid pro quo that would be inconsistent with a gift (*id.* at 424). The court denied a deduction for the discounts on the machines given to the schools, however, reasoning that the predominant motive for those transfers was to encourage the students to buy the taxpayer's sewing machines in the future. The court held that this was a "substantial" and specific return benefit quite apart from that which ordinarily inures to a charitable contributor. With respect to the transfers to the schools, the court concluded that "the transferor has received, or expects to receive, a *quid pro quo* sufficient to remove the transfer from the realm of deductibility under section 170" (*id.* at 423).

This Court's recent decision in *United States* v. *American Bar Endowment,* 477 U.S. 105, 116-118 (1986), reflects the same distinction between a quid pro quo arrangement and a genuine contribution. The taxpayers there sought to deduct under Section 170 part of their payments to a charitable organization for insurance coverage, contending that the excess of their premiums over the cost to the organization of providing the insurance qualified as a "contribution or gift" within the meaning of the statute. As a condition of participating in the group insurance program, the policyholders were required to agree that the organization could retain that excess (which was refunded by the insurance company), rather than distributing it to the policyholders. The Court denied the claimed deduction. Citing *Singer Co.* v. *United States, supra,* the Court stated that "[a] payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return" (477 U.S. at 116). The Court further explained (*id.* at 118): "The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return." The Court agreed with the trial court that, as a factual matter, the individuals had made payments for the quid pro quo of acquiring insurance coverage and that the taxpayers had not shown that the amount of the payments exceeded the value of the benefits received (see *id.* at 109, 118). Accordingly, the Court concluded that the taxpayers had not carried the burden of proof required to obtain a charitable deduction, *i.e.,* they did not "demonstrate that [they] in-

tentionally gave away more than [they] received" (*id.* at 118).

By its terms, Section 170 allows a deduction to be taken only for a "contribution or gift," regardless of the type of organization to which the payment is made. Thus, if the record demonstrates that the payments made to the Church by petitioner were not contributions but rather were in exchange for services to be rendered to them, as the courts below found, the payments were not "contributions," and Section 170 does not provide a basis for deducting them. In that event, petitioners have failed to carry their burden of establishing their entitlement to a deduction, because they are not "able to point to an applicable statute and show that [they] come[ ] within its terms" (*New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934)).

B. The Record Supports The Findings Of The Courts Below That Petitioners' Payments To The Church Were Not Contributions But Were Part Of A Quid Pro Quo Arrangement To Purchase Specific Services

The Tax Court found that, on the basis of the record of these cases as a whole, the payments to the Church were not contributions, but rather were made in exchange for the quid pro quo of auditing and training services. The court relied on evidence adduced as to both the structure of the system that provides these services for a "fixed donation" and petitioners' expectations in making the payments. The Tax Court's factual conclusion, affirmed by both courts of appeals below, is fully supported by the record.

The undisputed evidence in this case shows that auditing and training services were marketed by the Church and purchased by petitioners just like any other commodity that is offered for sale in the marketplace. One of the

Church's primary goals articulated in its policy statements is to "make money," [10] and the Tax Court found that this goal "permeates virtually all of [its] activities," including the provision of auditing and training services (Pet. App. 40a). To further this goal, the Church heavily promoted its services, not merely as an informational matter to its parishioners, but to the general public by means of flyers and radio and newspaper advertising (*ibid.*). The promotions emphasized the benefits that would accrue to an individual in his daily life if he purchased the Church's services—including improvement of study habits, efficiency, memory, and the ability to handle other people (see J.A. 110)—thereby seeking to make the services attractive to persons having no prior connection to or involvement with the Church. Indeed, the promotions were specifically geared to address community concerns that had been determined by surveys (Pet. App. 40a).

Like its promotional activities, the Church's pricing policies mirrored those of other retail businesses in seeking to advance the goal of making money. The Church offered a 5% advance payment discount and in its literature strongly urged individuals to take advantage of this discount (see J.A. 106-107). Moreover, the Church made efforts to persuade individuals to subscribe to large quanti-

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[10] The Church's Governing Policy of Finance was set forth in a policy letter, dated March 9, 1972. That letter listed several aspects of the policy and emphasized four of those by printing them in block letters. The emphasized goals were:

A. MAKE MONEY
J. MAKE MONEY
K. MAKE MORE MONEY
L. MAKE OTHER PEOPLE PRODUCE SO AS TO MAKE MONEY

See *Church of Scientology* v. *Commissioner*, 83 T.C. at 422; Pet. App. 40a.

ties of auditing and training courses, at considerable expense. Its pricing structure incorporated a quantity discount in that the price per hour of auditing intensives declined as the number of hours increased (see J.A. 97, 111-112), and the Church offered and heavily promoted the "savings" available on "package" deals (see J.A. 115, 120, 127; C.A. App. 101). Apart from the price discount, the advertising strongly emphasized the benefits to be gained from taking "a *lot* of continuous auditing," characterizing that as "[t]he key to total freedom and happiness" that would yield "more gains than you dreamed possible" (J.A. 111 (emphasis in original)). Finally, the Church sought to attract customers for its services by promising that "[a]ll fees [would be] promptly refunded to any dissatisfied student" (see J.A. 97).[11]

Furthermore, auditing and training courses were provided to individuals "only if they were purchased" (Pet. App. 42a) at the prices fixed by the Church. Those prices were almost never discounted or waived.[12] This strict

[11] In fact, the enrollment contract that individuals were required to sign in order to receive auditing and training services stated that refunds would be available only for services not provided, and therefore not in the event of dissatisfaction with services that were provided, and even those refunds were subject to certain conditions. See J.A. 104-105, 133.

[12] The only apparent exception to this practice of never providing auditing and training services for less than full price was the availability of free services to fully contracted staff. That free service, however, was conditioned upon the staff member's executing a legal note that would make him liable to the Church if he broke his employment contract. Pet. App. 39a n.6. In that event, the former staff member was termed a "freeloader" and was obligated to pay the Church the greater of the value of the free services received or liquidated damages of $5,000. *Church of Scientology* v. *Commissioner,* 83 T.C. at 416.

policy against provision of auditing or training courses without full payment of the prices set by the Church was strongly communicated throughout the organization in Church policy letters, which stated that "[p]rice cuts are forbidden under any guise" and "PROCESSING MAY NEVER BE GIVEN AWAY BY AN ORG." (Pet. App. 39a n.6) and characterized attempts to reduce prices as "high crime[s]" and "suppressive acts" (*Church of Scientology* v. *Commissioner,* 83 T.C. at 416 n.21). And the Church's practice of allowing refunds for unused services was consistent with this overriding policy of linking the provision of services to the payment of the full prices fixed by the Church. In sum, the record fully supports the Tax Court's finding that the Church "operate[d] in a commercial manner" in providing its services (Pet. App. 40a). Just like the typical seller of a commodity in the marketplace, the Church promoted its product, sought to induce customers to purchase it in large quantities, made it available to anyone willing to pay the full purchase price, and categorically refused to provide it to persons who would not pay that full price.[13]

The Church's approach to marketing and providing its services can leave little doubt in the mind of an interested individual that, in order to obtain the services, one must provide full payment in exchange; the record here shows that petitioners fully understood this quid pro quo arrangement and made their payments accordingly. Peti-

[13] As the Tax Court noted in *Church of Scientology* v. *Commissioner,* 83 T.C. at 422-423, the Church's organizational material was suffused with business terminology. One of its policy letters directed at the issue of Church solvency exhorted its branches to make certain that the "Introductory Lecture * * * makes people want to buy training and processing" and advised that the Department of Field Training should be treated "as salesmen are handled by any other business org." (*id.* at 423).

tioner Graham acknowledged in her testimony that she understood that she could not have taken the training courses that she desired without having paid the "fixed donation" (C.A. App. 288-289). Similarly, petitioner Hermann acknowledged that he understood that he could not have enrolled in the "class 9 package" of training without joining the staff of the Church or "donating" the price charged for the course (*id.* at 321).

The bookkeeping for the payments also reflected the common understanding that they were part of a quid pro quo arrangement for the receipt of auditing and training. On one of petitioner Hermann's checks to the Church, he had written the following (J.A. 113): "Down payment on vital information rundown, total price $500; balance to be added on to balance of class IX package. Next payment of $100 due Nov. '75." Other of his checks carried notations designating the class 9 package as the one for which the payments were being made (C.A. App. 119-120), and one was annotated "Package Payoff" (J.A. 113). Petitioner Graham received a "billing" for 8½ hours of auditing (J.A. 96), which she understood as detailing "what [she] owed the church" (C.A. App. 289). Petitioner Maynard signed a "Customer's Order" form, acknowledging his understanding that "it contains the basis upon which the above religious services of auditing and/or training are delivered by the Church"; that basis, according to the form, was the "sale" to him of a particular course at the designated "price at time of purchase" (J.A. 129-130).

Thus, the record establishes a direct and inflexible connection between the payments made by petitioners and the auditing and training services they received. Petitioners' transactions fall unmistakably into the category of a quid pro quo arrangement as defined by the Ninth Circuit below, namely "where it is understood that the taxpayer's money will not pass to the charitable organization, unless

the taxpayer receives a specific benefit in return, and where the taxpayer cannot receive the benefit unless he pays the required price" (Pet. App. 8a). On this record, the courts below all found that the payments had been made as part of a quid pro quo arrangement in exchange for the services received (see Pet. App. 10a, 43a; 87-963 Pet. App. 5a, 9a). The Fourth Circuit, reviewing the same record, cogently explained why this conclusion is inescapable:

> The transactions at issue in this appeal were unequivocally structured as payments made with the expectation of a commensurate return benefit. The Church advertised its auditing sessions, published price lists, and refused to provide the sessions without payment. The Church recognized the member's contractual right to receive the service and refunded payments if the sessions were not performed. * * * Since the Church member does not receive the service unless she pays the scheduled fee, the service, however labelled or analogized, is a quid pro quo for the payment and the payment is not 'charitable.'

Miller v. *Commissioner*, 829 F.2d 500, 503 (1987), petition for cert. pending, No. 87-1449. See also *Christiansen* v. *Commissioner*, 843 F.2d 418, 421 (10th Cir. 1988), petition for cert. pending, No. 87-2023 ("examination of the structure of these payments clearly reveals that they were made on a quid pro quo basis for services"); *Foley* v. *Commissioner*, 844 F.2d 94, 98-99 (2d Cir. 1988), petition for cert. pending, No. 88-102 (Newman, J., dissenting) ("Auditing sessions are advertised, priced, and marketed by the seller and bought by the customer as specific benefits for the purchaser, and the Tax Court could hardly have found otherwise."). Under established principles of law, therefore, the payments made by petitioners to the Church of Scientology were not "contributions or gifts" and hence not deductible under Section 170.

C. Section 170 Does Not Except Payments For Religious Benefits From The General Requirement That A Payment Be A "Contribution," Rather Than Part Of A Quid Pro Quo Arrangement, In Order To Be Deductible

Petitioners do not seriously dispute that the payments they made to the Church were part of a quid pro quo arrangement to receive auditing and training services. Instead, they maintain that this fact is irrelevant because the benefits they received were religious in nature. Petitioners contend that payments to tax-exempt religious organizations are treated differently from payments to other eligible donees under Section 170—that even if a payment to a religious organization is made to obtain a benefit, it is a "contribution," so long as the benefit received is a religious one. The courts of appeals that have reversed the Tax Court on the statutory issue presented here have similarly maintained that Section 170 embodies a distinction between secular and religious benefits. See *Neher* v. *Commissioner,* No. 86-1275 (6th Cir. July 19, 1988); *Foley* v. *Commissioner,* 844 F.2d 94 (2d Cir. 1988), petition for cert. pending, No. 88-102; *Staples* v. *Commissioner,* 821 F.2d 1324 (8th Cir. 1987), petition for cert. pending, No. 87-1382. Those courts have primarily based this holding on special properties that they find inherent in religious benefits, which, coupled with the policies underlying Section 170, suggest that payments to obtain such benefits must be tax-deductible. Petitioners, on the other hand, primarily rest their argument on two related assertions—that for 70 years the IRS has consistently administered Section 170 by drawing a distinction between religious benefits, on the one hand, and "benefits sold in the secular marketplace" (Pet. Br. 32), on the other hand, and that the payments made by petitioners in this case are indistinguishable from payments made to other religious organizations by their adherents that are universally recognized

as tax-deductible (see *id.* at 10-32). The courts below correctly rejected these arguments and held that Section 170 does not except payments for religious benefits from the general rule that a quid pro quo arrangement for the receipt of benefits is not a "contribution."

1. *There is Nothing in Section 170 or Inherent in the Nature of Religious Benefits that Justifies Excepting Payments for Such Benefits from the Rule that a Payment Made Specifically to Obtain a Commensurate Benefit in Return is not Deductible*

a. The terms of Section 170 plainly offer no support for petitioners' contention that payments to religious organizations in exchange for religious benefits are inherently different from payments to other eligible donees under Section 170(c)(2). Section 170 allows a deduction for a "contribution or gift" to the types of organizations listed, including "religious, charitable, scientific, literary, or educational" organizations (I.R.C. § 170(c)(2)). Thus, it is a threshold requirement that the payment be a "contribution or gift," *i.e.,* a genuine donation rather than a payment in exchange for particular benefits—regardless of what type of organization is the recipient of the payment. In the absence of any special status explicitly conferred by statute, religious institutions will ordinarily be viewed as standing on an equal footing in the contemplation of the tax law with the other charitable organizations named in Section 170(c)(2). For example, in *Bob Jones University* v. *United States,* 461 U.S. 574 (1983), this Court held that a religious school, like other types of tax-exempt organizations, must meet the common law description of "charitable" in order to qualify as exempt under Sections 170(c)(2) and 501(c)(3) of the Code. See also *Walz* v. *Tax Commission,* 397 U.S. 664, 673 (1970); *id.* at 687-689 (Brennan, J., concurring).

The Sixth Circuit in *Neher* suggested that the payments for auditing and training obtained here must be viewed as deductible because they "furthered the charitable purposes of the Church * * * [as the] predominant means of raising money to support its activities" (slip op. 12). See also *Staples,* 821 F.2d at 1327 (relying on "inherently charitable nature of strictly religious practices"). But that reasoning is fallacious, and it provides no basis for distinguishing between payments for religious benefits and those for other kinds of benefits. All of the organizations listed as eligible donees in Section 170(c)(2) are obliged to operate for "charitable purposes" and to put the public interest above the private interest; that is the basis for retaining their tax exemption. See *Bob Jones University* v. *United States,* 461 U.S. at 591. Thus, a payment to a school, a hospital, a museum, or any other organization included in Section 170(c)(2) goes to further the "charitable purposes" of the organization just as surely as a payment to a religious organization. In either case, Section 170 provides that the payment may be deducted if, but only if, it is a "contribution"—*i.e.,* it is not a quid pro quo in exchange for a specific benefit. In short, as the Ninth Circuit below concluded, "[t]he statute cannot be read to permit religions to offer a deductible quid pro quo while other charitable organizations may not" (Pet. App. 9a). See also *Hernandez,* 87-963 Pet. App. 6a; *Christiansen,* 843 F.2d at 420; *Miller,* 829 F.2d at 503-504.

b. Petitioner argues (Br. 35) that the receipt of a religious benefit cannot serve as a quid pro quo that would render nondeductible the payment for that benefit because "individual religious benefits are by law treated as 'incidental.' " This assertion is echoed by the courts of appeals that have agreed with petitioner. See *Foley,* 844 F.2d at 96; *Staples,* 821 F.2d at 1326. But the premise of this argument is incorrect. Neither the courts nor the IRS has ever

recognized a general principle to the effect that any religious benefit received by an individual must be regarded as a matter of law as primarily a public benefit of only "incidental" value to him. Such a principle would not comport with reality, and that point could not be more starkly illustrated than by the facts of this case.

The courts and the IRS have recognized that there may be "incidental" benefits received by an individual as a result of a charitable contribution that do not render that contribution nondeductible. That is an inevitable consequence of the fact that individuals usually have some reason for acting and therefore any contribution almost certainly provides some return to the donor, perhaps in the form of enhanced reputation or internal satisfaction for advancing a worthy cause. See *Neher,* slip op. 11. Obviously, that has much to do with why different people choose to contribute to different organizations. Accordingly, the IRS has been required to engage in drawing lines between benefits that are "incidental," such as "the satisfaction of fostering a worthy cause, even if the donor's name is memorialized by a cornerstone or professorial chair" (B. Bittker, *supra,* at 35-8), and benefits that constitute the kind of quid pro quo that disqualifies the payment as a contribution under Section 170. In particular, the IRS has grappled with this distinction in the context of membership dues, ruling that privileges such as the right to vote, hold office, or become known as a benefactor, are "incidental," but the right to discounts or to attend exclusive events is not. See *id.* at 35-9; Rev. Rul. 77-160, 1977-1 C.B. 351; Rev. Rul. 68-432, 1968-2 C.B. 104; Rev. Rul. 55-70, 1955-1 C.B. 506.

Thus, it is apparent that the concept of "incidental" benefits is not unique to the provision of religious benefits. Rather, the concept has been applied on a case-by-case basis to many different kinds of benefits provided by

charitable organizations, including both secular and religious benefits. In one of its rulings concerning a payment claimed as a contribution to a religious organization, the IRS has stated: "[T]he saying of mass or the conduct of similar religious observances under the tenets of a particular religion are of a spiritual benefit to all the members of that faith and to the general public. Any private benefit to a given family or individual that may result is regarded as merely incidental to the general public benefit that is served" (Rev. Rul. 71-580, 1971-2 C.B. 235, 236). But this conclusion is a factbound one addressed to masses or "similar religious observances"; contrary to petitioner's assertion (Br. 35), it plainly does not stand for the proposition that all religious benefits must be treated as "incidental."

On the record of this case, there is no basis for concluding that the individual benefits paid for and received by petitioner were merely "incidental" to a broader benefit received by the general public or other members of the Church of Scientology. The benefits attributed by the Church to the receipt of auditing and training were quintessentially personal, relating to such matters as the improvement of one's memory, efficiency, study habits, family life, and ability to handle other people (see, *e.g.*, J.A. 110, 111). Indeed, the Church's literature, in exhorting people to subscribe to a *lot* of auditing, emphasized that one should "[m]ake certain you get a lot *for yourself*" (J.A. 111 (emphasis in original)). The enrollment form signed by applicants for Church programs states that "the benefits obtainable from Church services * * * are personal and are experienced by the individual himself or herself" (J.A. 132). On the other hand, it is not apparent that an auditing session for a particular individual was believed to yield any significant benefit to other members of the Church. Thus, the record in this case indicates that partici-

pants in the Church's auditing and training sessions paid for and received "far more than incidental benefits" (*Foley*, 844 F.2d at 98 (Newman, J., dissenting)). See also Pet. App. 10a-11a.

c. Petitioners contend (Br. 37-41) that only secular benefits can be considered part of a quid pro quo for a payment because religious benefits have no "calculable financial or economic value" (Br. 39). This argument is also made by the courts of appeals that have reversed the Tax Court on this issue. See *Neher*, slip op. 15; *Foley*, 844 F.2d at 97; *Staples*, 821 F.2d at 1327. This objection lacks substance, however, because the ascertainment of a benefit's intrinsic "financial or economic value" is not an element of the inquiry into whether a payment for that benefit is a genuine contribution that is deductible under Section 170. Many, if not all, commodities cannot be said to have an intrinsic economic value; rather, their "value" is ascertained by what people are required and willing to pay for them. When religious benefits are provided in a setting that is essentially indistinguishable from the setting in which other commodities are provided, the benefits have a "value" in the same way. Even if the ultimate benefit to be derived from the religious services is spiritual, as opposed to the more material benefits that are the motivation for purchasing other types of commodities, that does not defeat the possibility that the religious services may be provided on a quid pro quo basis in which the value to the purchaser is reasonably measured by the price he must pay for the services. When the facts demonstrate such a quid pro quo arrangement, Section 170 does not allow a deduction for the payment. As the Ninth Circuit below remarked on this point (Pet. App. 9a): "The test is not the economic character of what the payor receives but whether there is a specific, measurable quid pro quo for the donation in question. Though the economic aspect of a reward

makes it easier to identify such a transaction, it is not a precondition to application of the test."

The ultimate question is whether the payment claimed to be a contribution "is intended to benefit the charity without reference to a reciprocal and specific benefit to the donor" (Pet. App. 9a). In some cases, that question can be answered quite clearly by examining the structure created by the organization for the provision of that benefit, *i.e.*, the circumstances under which the payment is made and the benefit received. That is the case here. The Church established a firm tie between the provision of auditing and training services and the payment of the advertised price for those services. On the one hand, the services would not be provided unless payment was made; on the other hand, payment of the advertised price entitled an individual to receive the services. That is undeniably a description of a quid pro quo arrangement, which does not give rise to a charitable contribution deduction.[14]

[14] There will, of course, be cases where the value of a benefit may be ascertainable by evidence other than the transaction in question—for example, where the benefit is offered by someone other than the organization to which the taxpayer made the payment. The existence of such an externally ascertainable value is not restricted to the secular context; items that have no purpose or "value" other than for use in religious services are often sold in stores. Reference to the value of a service that is ascertained by looking outside the particular transaction can be relevant to the Section 170 inquiry. When a taxpayer makes a payment to an organization and receives a valuable benefit therefrom, it may sometimes be inferred that there is a quid pro quo relationship between the two, even if, in contrast to this case, the structure under which the benefit is provided does not unequivocally demonstrate a quid pro quo relationship. For example, the courts have consistently disallowed contributions claimed for payments made to religious schools to the extent of the value received from the schools, even where the record showed that students could still be admitted to school even in the absence of a contribution. The courts have reasoned that, even if the contribution was not an explicit prerequisite to admission, "the contributions were induced in substantial part by the benefits which the parents anticipated from the enrollment of their children and should be considered tuition payments" (*Winters* v. *Commissioner*, 468 F.2d 778, 781 (2d Cir. 1972)). See also *Oppewal* v. *Commissioner*, 468 F.2d 1000, 1002 (1st Cir. 1972); *DeJong* v. *Commissioner*, 309 F.2d 373 (9th Cir. 1962); Rev. Rul. 83-104, 1983-2 C.B. 46. This type of externally ascertainable value can also be relevant when the structure of the payment and benefit does demonstrate a quid pro quo arrangement. For example, when an individual purchases a ticket to attend a benefit concert, the circumstances indicate that admission to the concert is the quid pro quo for the payment and would suggest at first blush that no part of the payment is a contribution. Where admission to the concert has some ascertainable market value, however, the taxpayer can demonstrate that the portion of his payment in excess of that value should be deductible as a contribution. See *United States* v. *American Bar Endowment*, 477 U.S. at 117. But reference to the value of a benefit in these contexts does not suggest that a charitable contribution deduction should be permitted when a payment is clearly made in exchange for a specific benefit, just because the value of the return benefit cannot be ascertained outside the context of the particular transaction.

Thus, the courts of appeals have recognized that the services received by petitioners in exchange for their payments had a "value" to them for purposes of the Section 170 inquiry; that is just another way of saying that the services were provided as part of a quid pro quo arrangement. As the Fourth Circuit explained, "the value which the taxpayer *expects* to receive, whether religious or secular, can be measured when she must pay a fixed fee in order to receive it. * * * [Therefore,] in the peculiar circumstances before us it is the *structure* of the Church's fixed donation plan, and not any post hoc characterization of the service rendered, that should determine whether the taxpayer is paying for a service of value to her or making a 'charitable contribution.' " *Miller*, 829 F.2d at 504 (emphasis in original). The Ninth Circuit below listed numerous attributes of the structure set up by the Church to market its

services, remarking that they "all underscore that the payment matched, with some precision, the benefits to be received" (Pet. App. 10a). The court further found that "[t]he value of the quid pro quo received by the taxpayers was easy for the Tax Court to determine, simply by looking at the amount of money they were willing to pay for it in a market setting," and the court noted that the fact "[t]hat the benefit may have had value only to religious adherents is not significant, given its measurable attributes" (*ibid.*). The First Circuit noted that "the Church of Scientology itself established and advertised the monetary prices ('fixed donations') for the services at issue" (87-963 Pet. App. 8a). The Tenth Circuit stated that "[a] benefit does not have to be economic to bar the deduction" (*Christiansen,* 843 F.2d at 420); "examination of the structure of these payments clearly reveals that they were made on a quid pro quo basis for services" (*id.* at 421). The court added that "there is no problem in determining the value of the services since the value has been set by the Church and is not contested by the taxpayers" (*ibid.*).[15]

[15] The court of appeals in *Staples* stated that "[s]piritual gain to an individual cannot be valued by any measure known in the secular realm" (821 F.2d at 1327), but that is not an objection to the decisions below because it is not "spiritual gain" to which the courts have attached a value. The quid pro quo for the payments here was the auditing and training courses provided by the Church in exchange, not the "spiritual gain" that may have accrued to petitioners as a result of receiving the auditing and training. These services have an ascertainable value to those who purchase them, reflected by the purchase price, in the same way that a concert ticket does. The price of the concert ticket reflects the value to the purchaser of the quid pro quo—admission to the concert; the price does not value the ultimate benefit to the purchaser, *i.e.*, his enjoyment of the concert. That ultimate benefit will vary from individual to individual and it cannot reasonably be valued, but that does not alter the fact that the payment for the concert ticket is part of a quid pro quo arrangement for admission to the concert. Similarly here, the quid pro quo inquiry focuses on what the individual is willing to pay in exchange for the advertised services; that inquiry does not entail any valuation of "spiritual gain."

Each of these formulations amounts to the same conclusion—that the record here unequivocally demonstrates that payments made to the Church of Scientology were not contributions, but rather were made to receive the specific quid pro quo of auditing and training. As Judge Newman succinctly stated, the issue whether these payments were part of a quid pro quo arrangement "is not even close. Auditing sessions are advertised, priced, and marketed by the seller and bought by the customer as specific benefits for the purchaser, and the Tax Court could hardly have found otherwise" (*Foley,* 844 F.2d at 98-99 (Newman, J., dissenting)).[16]

[16] The court of appeals in *Staples* suggested that the stipulations of fact here could not be reconciled with a holding that petitioners made payments in exchange for the benefit of auditing and training. The court stated that the stipulations "foreclose any reliance on the Church of Scientology's fixed donations as representing the value of its essentially religious practices" because the stipulations show that "the fixed donations are not market prices set to reap the profits of a commercial moneymaking venture," but rather a "bona fide church['s] * * * mechanism for raising funds from its members" (821 F.2d at 1327-1328). See also *id.* at 1325; *Neher*, slip op. 5, 16. It is clear that the court of appeals in *Staples* erroneously "exaggerated" the effect of the government's stipulations (see *Miller,* 829 F.2d at 504). The government stipulated that it would not contest in these cases that the Church of Scientology was a tax-exempt church (see Pet. App. 31a-32a). That stipulation removed what might otherwise have been raised as an independent ground for disallowing the deductions—the argument that the recipients of petitioners' payments were not eligible donees under Section 170(c)(2), an issue that was at the time being litigated for the "mother" Church in *Church of Scientology* v. *Commissioner, supra.* But that stipulation does not foreclose the courts from finding that the Church's programs at issue, even if they were religious, were provided on a quid pro quo basis for specified prices—

2. *Disallowance of Petitioners' Claimed Deductions Does Not Represent a Departure from any Established Administrative Practice*

Petitioners' primary contention is that, regardless of the plain import of the language of Section 170, "seventy years of consistent IRS interpretations" (Br. 10) have recognized that payments made in exchange for religious benefits are deductible (Br. 10-32). To support this contention, petitioners refer to a few IRS rulings (see Pet. Br. 10-11, 25) and to the fund-raising practices of other religious organizations (see *id.* at 18-27), which assertedly have been recognized by the IRS as yielding deductible contributions and also are claimed to be "indistinguishable" (*id.* at 14) from those at issue in this case. See also *Neher,* slip op. 18-20; *Staples,* 821 F.2d at 1326. This contention is mistaken on both counts. Neither IRS rulings nor the practices of other religions support the proposition that there has ever been an administrative construction of Section 170 that permits a taxpayer to take a charitable deduction for payments made to obtain commensurate religious benefits in return.

a. At the outset, the IRS's treatment of payments made to religious schools (see note 14, *supra*) belies the assertion that it invariably treats as a deductible contribution a payment to a religious organization for a religious benefit. The IRS has consistently taken the position that a payment to a religious school is not a "contribution or gift" when it is primarily designed to defray the costs of educating the taxpayer's child, and the courts have consist-

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a fact that is clearly established by the record—and therefore that the payments made by petitioners were not "contributions," but rather were made for the purpose of receiving auditing and training in exchange. A stipulation that a university is a tax-exempt institution under Section 501(c)(3) does not mean that tuition payments are deductible from gross income under Section 170.

ently sustained that position. See generally Rev. Rul. 83-104, 1983-2 C.B. 46. The payments have been held not to be contributions because "the parent taxpayers both anticipated and received substantial benefits from their payments" (*Winters* v. *Commissioner,* 468 F.2d 778, 781 (2d Cir. 1972)).[17] The close connection between the payment to the school and the rendition of services has been deemed inconsistent with deductibility even though a significant element of the benefit received was a religious education. See, *e.g., DeJong* v. *Commissioner,* 309 F.2d 373, 374 (9th Cir. 1962) (noting that the school was "God-centered" and taught Christian religion and doctrines "as a part of [its] regular curriculum"). As the First Circuit below noted (87-963 Pet. App. 8a), the outcome of the school cases has not rested on a finding that the "return benefits" received by the taxpayers were exlusively or even predominantly secular; the courts made no effort to determine what aspects of the education were "strictly religious." Similarly, we are advised by the IRS that it would not allow a deduction for payments made in exchange for a strictly religious educational benefit, such as tuition to a divinity school or seminary (although to our knowledge this precise issue has never been the subject of litigation or a revenue ruling).

Even apart from the religious school cases, there is little basis for petitioners' assertion that the IRS has administered Section 170 to provide a special exception for payments made in exchange for religious benefits. The ruling that gives rise to petitioners' claim of "seven decades of consistent IRS interpretations" (Pet. Br. 11) is A.R.M. 2,

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[17] See also *Oppewal* v. *Commissioner,* 468 F.2d 1000 (1st Cir. 1972); *DeJong* v. *Commissioner,* 309 F.2d 373 (9th Cir. 1962); *Haak* v. *United States,* 451 F. Supp. 1087 (W.D. Mich. 1978); *McLaughlin* v. *Commissioner,* 51 T.C. 233 (1968).

1 C.B. 150 (1919), which concluded that pew rents, church dues, and basket collections all "ordinarily and customarily" fall within the definition of "contribution" for purposes of the charitable deduction provisions. The explanation in the ruling is terse and fairly cryptic. The ruling stated that "[i]t is believed that the real intent is to contribute and not to hire a seat or a pew for personal accommodation." The ruling also noted that "in practice the so-called 'personal accommodation' [pew rents] may afford is conjectural"; "basket contributors sometimes receive the same accommodation informally." *Ibid.* That ruling was reaffirmed in Rev. Rul. 70-47, 1970-1 C.B. 49, without substantial elaboration. Treasury stated there that "[p]ew rents, building fund assessments, and periodic dues paid to a church * * * are all methods of making contributions to the church."

A subsequent ruling in a related context added some further explanation for this treatment of payments of this type to a church. In Rev. Rul. 77-160, 1977-1 C.B. 351, Treasury indicated that the same standards applicable to membership dues in secular organizations (see Rev. Rul. 68-432, 1968-2 C.B. 104) apply to church dues. The ruling then observed that church dues generally "confer no significant rights on the individual members, and are paid for the purpose of supporting the congregation and furthering its religious activities," whereas any personal benefits that a person may receive by virtue of church membership would best be described as "incidental" (Rev. Rul. 77-160, 1977-1 C.B. 351, 352).

The infrequency and brevity of these rulings perhaps leave something to be desired for purposes of articulating a complete analytical framework, but it is clear enough that the rulings do not reflect the establishment of a special exception under Section 170 for payments made to religious organizations to obtain religious benefits. In-

stead, the rulings attempt to apply on a case-by-case basis the basic inquiry applicable to all payments sought to be deducted under Section 170—whether the payment is made as part of a quid pro quo arrangement to secure a particular benefit. The premise of the 1919 ruling is not that religious benefits are special; it is the more factbound conclusion that church dues, pew rents, and basket collections are all designed as contributions for the general support of the church and that any privileges that the donor receives are incidental to that end and disproportionate to the size of the contribution. Treasury concluded, not unreasonably, that the "real intent" of such payments "is to contribute and not to hire a seat or a pew for personal accommodation" (A.R.M. 2, 1 C.B. 150), *i.e.*, the payments are not designed to obtain a quid pro quo return benefit.

It is not fairly possible to reach a similar conclusion on the record in this case. The Tax Court found, and the courts below agreed, that petitioners' payments were "not voluntary transfers," but "were made with the expectation of receiving a commensurate benefit in return" (Pet. App. 43a). Thus, the Ninth Circuit below specifically found that "[t]he Tax Court had sufficient evidence to distinguish [petitioners'] fixed donations from deductible payments to religious organizations in which the primary motivation is presumed to be charitable" (*id.* at 11a). In short, denial of the deductions claimed by petitioners here does not mark a "dramatic reversal" (Pet. Br. 28) of the IRS's prior positions. To the contrary, the basic approach here is not significantly different from that in the 1919 ruling. The difference is that the unusual facts in these cases do demonstrate that the payments were made primarily for "personal accommodation," and therefore they should not be deductible under Section 170. As the Fourth Circuit explained in *Miller,* the fact that payments to a church or

other non-profit organization "may be ordinarily deductible * * * because the benefits [the taxpayer] receives are 'incidental' to the benefits which flow to other members of her church or to the general public" does not mean that payments to a church are always deductible; "even payments to a church for 'religious services' can be structured as here so that their benefit is a quid pro quo—a direct and commensurate benefit—which the member is purchasing" (829 F.2d at 505).

b. There is similarly no merit to petitioners' assertion (Br. 14-29) that the payments in this case are indistinguishable from fund-raising techniques of many other religions that allegedly are recognized as yielding tax-deductible contributions. In support of this contention, petitioners describe a litany of fund-raising practices in different religions (Br. 18-25), most of which have not been passed upon by the IRS. These practices are diverse; some seem clearly to yield deductible contributions, some may be "close to the line" (*Foley,* 844 F.2d at 98 (Newman, J., dissenting)), and some may not yield deductible contributions. Their respective tax consequences would depend on the facts surronding the payments that would have to be developed in an appropriate setting. What these diverse practices do have in common is that they all are different from the inflexible quid pro quo arrangement present in these cases, and none of them provides any reason to doubt the correctness of the decisions below.

First, there is no reason to accept petitioners' assertion that the IRS has approved a tax deduction for all of the practices enumerated by petitioners, even if we assume that they in fact operate as petitioners describe. For example, petitioners contend (Br. 25) that their payments for auditing and training should be analogized to a practice in Jewish Reform temples of using special fees to raise funds, such as a fee to participate in a Passover meal. The source

that petitioners cite describes this fee as a "nominal" one "to help contain the costs," not to raise funds. National Association of Temple Administrators, *Temple Management Manual* Ch. 4, at 11 (J. Feldman, H. Fruhauf & M. Schoen eds. 1984). There is no reason to assume that taxpayers generally would even claim a deduction for a fee to help defray costs of providing them with a meal, and certainly no reason to believe that the IRS would agree that they were entitled to such a deduction. Indeed, the other example given in the Temple Management Manual of such a special fee is a charge for the use of facilities in connection with the celebration of a Bas Mitzvah. *Ibid.* The IRS has successfully challenged an attempt to take a deduction for such a payment. *Feistman* v. *Commissioner,* 30 T.C.M. (CCH) 590 (1971).

More generally, even without making a detailed factual inquiry, it is apparent that the practices described by petitioners differ in significant respects from the highly commercialized provision of individual benefits present in these cases. "Mass stipends" (see Pet. Br. 18-20) have been regarded by the IRS as conferring only an incidental benefit upon the donee. See Rev. Rul. 71-580, 1971-2 C.B. 235, 236. This conclusion is a reasonable one given that the masses are said for the benefit of all church members and that the masses would be said anyway even without the payment of the stipend (see Rev. Rul. 78-366, 1978-2 C.B. 241); in that situation, the application of the mass in the name of a particular person may be more analogous to a plaque honoring a donor, which is generally regarded as an incidental benefit, than to the provision of personal auditing and training services involved in this case. Mormon "tithing" (see Pet. Br. 21-22) plainly does not involve a quid pro quo arrangement in which "it is understood that the taxpayer's money will not pass to the charitable organization unless the taxpayer receives a specific benefit in re-

turn" (Pet. App. 8a). "Temple recommends" are issued only to "worthy" members. There are several tenets of the Mormon faith, of which tithing is only one, that must be observed in order to meet the "worthiness" standard. Therefore, unlike the payments here, tithing is not a "ticket" to a "temple recommend"; a Mormon who tithed but, for example, did not abstain from alcohol would not be entitled to a "temple recommend." See Church of Jesus Christ of Latter-Day Saints, *General Handbook of Instruction,* at 6-1 (1985).

By the same token, the Jewish fund-raising practices described by petitioners differ significantly from those of the Church of Scientology. Membership dues (Pet. Br. 22-23), like those paid to secular organizations, often do not confer anything more than incidental benefits on the members. And such dues generally are not fixed like the payments in this case; rather, petitioners' source indicates that they are paid either on a "self-evaluation" basis or on a sliding scale according to financial status. See *Temple Management Manual, supra,* Ch. 4 at 9. While there are variations among synagogues, there is no basis for assuming that those that do sell High Holy Day tickets to raise funds (Pet. 23) do so in a manner analogous to the activities at issue here. Rather, synagogues frequently make arrangements for people of limited means to attend services without purchasing a ticket; there is no edict declaring that "[p]rice cuts are forbidden under any guise" (Pet. App. 39a n.6). Nor is there any reason to believe that one who paid money to obtain a High Holy Day ticket would expect a refund if he did not attend services. In sum, the fund-raising practices of other religions cited by petitioners are not suffused with the money-making intent and rigid linkage between payment and the provision of individualized services that is the hallmark of the Church of Scientology's system of "fixed donations" for auditing and

training. Each type of payment must be judged on its own facts to determine whether it is a genuine contribution or part of a quid pro quo arrangement. The existence of the cited practices of other religions therefore provides no basis for questioning the correctness of the decision below.

II. The Denial Of Petitioners' Claimed Charitable Deductions Because Their Payments To The Church Were Not "Contributions Or Gifts" Does Not Violate The First Amendment

Petitioners argue that the denial of deductions for their payments to the Church violates the First Amendment. They argue that the denial violates the Establishment Clause by creating a "denominational preference" (Pet. Br. 46-48) and because an inquiry into whether a payment is made in exchange for a religious benefit necessarily creates an unconstitutional "entanglement" with religion (*id.* at 43-46). These arguments were correctly rejected by the courts below (Pet. App. 11a-18a; 87-963 Pet. App. 9a-24a) and the other courts of appeals that have considered them (see *Christiansen,* 843 F.2d at 421; *Miller,* 829 F.2d at 505-506).

A. Petitioners argue that Section 170, as interpreted by the courts below, establishes an unconstitutional denominational preference, apparently because it does not provide a tax deduction for the Church of Scientology's chosen method of fund-raising, while it does permit tax deductions for payments made in the context of fund-raising by other religions. This argument is entirely without merit. Section 170 establishes neutral, secular criteria for determining when a payment to a tax-exempt organization is deductible, and it does not create a denominational preference.

It is well established that a statute does not necessarily violate the First Amendment merely because its application happens to be more advantageous for one religion

than for another. Thus, in *Bob Jones University* v. *United States, supra,* it was clear that the denial of a tax deduction to racially discriminatory religious schools did not violate the First Amendment despite the schools' assertion that Section 170, as interpreted by the Court, "preferr[ed] religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden" (461 U.S. at 604 n.30). The court explained that when the government policy is founded on a " 'neutral, secular basis,' " there is no Establishment Clause violation merely because that secular basis draws distinctions among religions (*ibid.*, quoting *Gillette* v. *United States,* 401 U.S. 437, 452 (1971)).

These principles foreclose petitioners' contention. Section 170 operates on a neutral, secular basis. It applies the same criteria to all tax-exempt organizations, including all religious ones—namely, that payments made to them will be deductible if they are contributions, but not if they are part of a quid pro quo arrangement in exchange for specific benefits. The fact that the Church of Scientology chooses to raise its funds by means of such a quid pro quo arrangement, even if the choice is a matter of religious doctrine, does not convert the neutral statute into one that creates a denominational preference. As the Court has stated on several occasions, a statute does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions" (*McGowan* v. *Maryland,* 366 U.S. 420, 442 (1961)). See also *Bob Jones University* v. *United States,* 461 U.S. at 604 n.30; *Harris* v. *McRae,* 448 U.S. 297, 319-320 (1980).

Applying these principles, the courts of appeals have uniformly held that Section 170 does not create a denominational preference. The First Circuit below stated that "the 'contribution or gift' requirement is a secular criterion encouraging gifts to all religious and nonreligious

charitable organizations and communicating no government preference for any particular charitable organization" (87-963 Pet. App. 10a). Similarly, the Ninth Circuit below found that "[t]he rules for charitable deduction are neutral in design and purpose" (Pet. App. 18a). See also *Miller,* 829 F.2d at 505. The denial of petitioners' claimed deductions was grounded on that neutral statutory requirement, and it raises no inference of any unconstitutional discrimination among religions.[18]

B. Petitioners state that disallowance of their deductions "places a heavy burden on the central practice of Scientology" (Pet. Br. 47 (footnote omitted)). To the extent this statement is intended to raise an argument that denial of the claimed deductions violates the Free Exercise Clause, that argument was correctly rejected by the courts of appeals below. Petitioners' argument appears to be that the Church of Scientology's religious tenet of the "Doctrine of Exchange" requires it to offer its services on a quid pro quo basis; thus, under Section 170, Scientologists are required to choose between forgoing a tax deduction or abandoning this tenet of their faith. To the extent this is a burden on the practice of petitioners' faith, there can be

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[18] Petitioners rely almost exclusively on *Larson* v. *Valente,* 456 U.S. 228 (1982), but that case is clearly inapposite. *Larson* recognized the vitality of the principles discussed above, notably the principle that neutral, secular criteria are not unconstitutional simply because they affect different religions in different ways. See *id.* at 246-247 n.23. The Court found those principles inapplicable in *Larson* only because that case did not involve "a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations." Instead, *Larson* involved a statute that made "explicit and deliberate distinctions between different religious organizations." *Ibid.* Because the present cases do involve a facially neutral statute that makes no attempt to distinguish among religions, *Larson* plainly has no application here. See Pet. App. 18a; 87-963 Pet. App. 10a; *Miller,* 829 F.2d at 505.

little doubt under the decisions of this Court that it is not an unconstitutional burden.

In *United States* v. *Lee,* 455 U.S. 252 (1982), this Court sustained the imposition of social security taxes upon members of the Old Order Amish whose faith forbids paying such taxes or receiving social security benefits. The Court held that the burden placed upon the free exercise of the taxpayers' beliefs was outweighed by the "broad public interest in maintaining a sound tax system" (*id.* at 260). The Court emphasized that the diverse and cosmopolitan nature of our society makes it difficult to accommodate all religious beliefs in the tax laws (*id.* at 259-260). Petitioners' Free Exercise Clause claim is considerably weaker than that of the taxpayer in *Lee.* Unlike the situation in that case, the neutral application of the tax laws here does not force petitioners to violate any tenet of their religion, it requires them only to forgo a tax deduction. While that may be some burden on the exercise of their religion, it is clearly outweighed by the strong policies in favor of evenhanded administration of the tax laws that counsel against requiring the Internal Revenue Code to confer a special exception upon the Church because of its Doctrine of Exchange. Compare *Bob Jones University* v. *United States,* 461 U.S. at 603-604 (burden of denying tax exemption to racially discriminatory schools outweighed by government interest in eradicating discrimination from education). As the Ninth Circuit below stated, "the soundness of the tax system depends on government's ability to apply the tax law in a uniform and evenhanded fashion, and the exemption of one presages the exemption of a great many others" (Pet. App. 17a). Thus, the courts of appeals have correctly held that the First Amendment does not require that the IRS allow a tax deduction for a payment that is part of a quid pro quo arrangement. See *id.* at 15a-17a; 87-963 Pet. App. 23a-24a; *Miller,* 829 F.2d at 506.

C. Petitioners also argue (Br. 43-46) that the inquiry into whether a payment to a religious organization is a contribution or a quid pro quo necessarily creates unconstitutional entanglement with the religion. Petitioners' objection apparently rests in large part on the view that the IRS must determine the economic value of religious benefits in order to determine whether they are provided as a quid pro quo for a payment. That is incorrect (see pages 33-37, *supra*). The quid pro quo determination is made on the basis of an inquiry into the circumstances surrounding the payment to assess whether it is a genuine contribution or equivalent to a purchase of a commensurate return benefit. While that inquiry may entail some administrative contact with the religious entity, it does not impermissibly entangle the state in matters of religious dogma. Indeed, as the First Circuit below noted (87-963 Pet. App. 14a), the test proposed by petitioners poses a much greater risk of entanglement, since the IRS would be put in the position of determining which benefits are "strictly religious" (*Staples,* 821 F.2d at 1327) and which are secular. See also *Miller,* 829 F.2d at 506.

Moreover, this is not a case where the government has undertaken a program to aid a religious institution, which is the typical sort of case that raises Establishment Clause concerns about entanglement. Compare, *e.g., Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). Rather, the limited administrative contact here is necessary for the law enforcement purpose of assuring evenhanded administration of the tax system; just like enforcement of building codes and zoning regulations, this type of administrative contact does not ordinarily raise First Amendment concerns. See *Tony & Susan Alamo Foundation* v. *Secretary of Labor,* 471 U.S. 290, 305-306 (1985). In essence, the quid pro quo inquiry does not differ whether the recipient of the payments is a religious organization or one of the other

types of charitable organizations specified in Section 170(c)(2) of the Code—regardless of whether the particular benefits received in exchange for the payments are religious in nature. Accordingly, that quid pro quo inquiry does not necessitate any unconstitutional entanglement with religion.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The First Amendment to the Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

Section 170 of the Internal Revenue Code (26 U.S.C.) provides in pertinent part:

Charitable, etc., contributions and gifts

(a) Allowance of deduction

(1) General rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

* * * * *

(c) Charitable contribution defined.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or edu-

cational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B). * * *

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